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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAHZIEL VALENZO,

Defendant and Appellant.

B234081

(Los Angeles County
Super. Ct. No. KA090612)

APPEAL from an order of the Superior Court of the County of Los Angeles,
George Genesta, Judge. Affirmed in part, and remanded with instructions.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Blythe J. Leszkay and
John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Jahziel Valenzo (defendant) guilty of first degree murder and further found true, inter alia, a gang enhancement allegation. On appeal, defendant raises four challenges to the jury's true finding on the gang allegation. Defendant also contends that the trial court abused its discretion when it refused to allow defense counsel to argue that defendant acted out of fear when he shot the victim. And defendant contends that the trial court erred in imposing a 10-year sentence enhancement pursuant to Penal Code section 186.22, subdivision (b)(1)(C).¹

We hold that substantial evidence supported the true finding on the gang allegation and that the trial court did not err in allowing the gang expert to testify concerning the gang allegation. We further hold that the trial court did not abuse its discretion when it did not permit defense counsel to argue that defendant acted out of fear. And we agree with the parties that the trial court erred when it imposed a 10-year sentence enhancement under section 186.22, subdivision (b)(1)(C).

FACTUAL BACKGROUND

A. The Shooting of Preciado

Defendant, who went by the nickname Smash, was the father of Jessica Perez's son. In the two years following her son's birth, Jessica and defendant had broken off their relationship twice. After the second break-up in March 2010, she began dating the victim, Ruben Preciado, who was her co-worker. She dated him for a month or less. Jessica sensed that there was hostility between Preciado and defendant, and while she was dating Preciado she heard him say "bad things about defendant." After dating Preciado for about a month, Jessica decided that she wanted her son to live together with

¹ All further statutory references are to the Penal Code unless otherwise indicated.

his father and mother, so she resumed her relationship with defendant, who moved into her mother's home to live with Jessica and their son.

On the evening of May 10, 2010, defendant arrived at Jessica's home accompanied by Jonathan Perez, also known as Chato. Perez was dating Jessica's sister, and the two couples "were hanging out at [Jessica's] mom's [house]" that evening. Later that evening, defendant and Perez told Jessica they were going out in front of the house, but at around 8:30 p.m., she noticed they had left that location.

Los Angeles Sheriff's Detective Ralph Hernandez was one of the homicide investigators assigned to investigate the shooting of Preciado. He interviewed Mauricio Miramontes² at school on May 18, 2010. During the interview, Miramontes provided the following information about the shooting of Preciado: On the day of the shooting, defendant and Michael Marquez approached Miramontes at school. Defendant was upset with Preciado and he asked Miramontes to arrange a fight between defendant and Preciado to settle their differences. Defendant told Miramontes that, regardless of the outcome of the fight, Miramontes should not talk to the police about it. Defendant and Miramontes agreed that the fight would take place early that evening at a nursery. But after the meeting, defendant called Miramontes, changed the location of the fight to a bridge, and changed the time of the fight to 8:00 p.m. Defendant called Miramontes again at 8:00 p.m. and postponed the fight until 8:30 p.m. when it would be dark, and he agreed with Miramontes to meet Preciado at the "projects," not the bridge.³

² Miramontes testified at trial, but was uncooperative. Detective Hernandez therefore testified as to the information Miramontes provided about the shooting during a tape recorded interview, and the recorded interview was played for the jury.

³ In his reply brief, defendant asserts that the transcript of Detective Hernandez's interview with Miramontes suggests that Miramontes changed the location of the fight to the projects, not defendant.

That evening, Miramontes was at a carport in front of the agreed upon location of the fight⁴ with approximately five other males. He saw defendant, Perez, and Marquez arrive at the carport on bicycles. Defendant asked Miramontes where Preciado was located. Defendant then walked into the apartment complex, while Perez and Marquez waited outside near Miramontes and the other males. According to Miramontes, Marquez looked nervous and he had a gun in his waistband. At that point, Miramontes realized “this was going to go bad.” Miramontes heard three gunshots and saw a “muzzle flash coming from the backyard.” Miramontes ran toward his house. Preciado, who had been shot three times—twice in the back and once in his chest—was found lying face up in the rear yard of the apartment complex on North Rockvale and died at the scene.

At about 9:30 p.m. that night, Marquez arrived at Jessica’s house and appeared nervous, pale, and sweaty. When Jessica asked Marquez where defendant was, he said they were being chased by Azusa 13 gang members. Because she had lived in Azusa her entire life, Jessica knew Azusa 13 was a gang in Azusa. Jessica and her mother went to their car and drove around their neighborhood looking for defendant. When they could not locate defendant, they went home and Jessica tried to call defendant on his cell phone. She contacted defendant around 10:00 p.m. and told him to come home. Defendant arrived at Jessica’s home about 10 minutes later, and when they went to her room, she saw defendant place a gun wrapped in a black shirt or sock under a drawer. Jessica told defendant to remove the gun from her house, and defendant said he would remove the gun the next morning.

When Jessica informed defendant that Marquez had told her that defendant was being chased, defendant denied being with Marquez that evening. Jessica and defendant then fell asleep, but Jessica was awakened by defendant talking on his cell phone to a female. She waited for him to finish the call and then asked him why he denied during the conversation that he was in Azusa. She further inquired why the female called crying, saying “was it you?” and why defendant told the female it “wasn’t him.” Jessica

⁴ The confrontation took place in the backyard of an apartment complex located at 603 North Rockvale Avenue, Azusa.

asked defendant what he had done, and defendant told her Preciado “got beat up,” but denied that he was involved. Defendant explained it was Perez who shot Preciado three times. When Jessica told defendant it could not have been Perez who shot Preciado, defendant “confessed” to her that he shot Preciado.

Jessica was shocked by defendant’s confession and she told him to leave her house. She left the room and turned on the television to determine if there were any news reports about the shooting. Seeing no news reports, she returned to her room and again asked defendant to leave. Defendant replied that he would leave in the morning.

The next morning defendant left for his school and Jessica left for her school a short time later, thinking Preciado was in the hospital. But at school, Jessica heard that someone had died at the projects, causing her to call Preciado’s father, who told her Preciado had been killed. She next called her mother and asked her to come to school and pick her up. She told her mother that someone had killed Preciado. But when Jessica’s mother asked her who killed Preciado, Jessica said she did not know.

Jessica went home and fell asleep. Her sister awakened her and told her the police were at the door. The officers told Jessica they were looking for defendant, and she told them she was unsure of his whereabouts, but thought he was at school. The officers took Jessica and her sister outside and searched the house. Following the search, Jessica went inside the house with Detective Hernandez. She informed the detective that defendant had been there the night before and left a gun under a drawer in her room. Detective Hernandez recovered the gun⁵ from that location.

City of Azusa Police Detective Robert Landeros worked on an interagency task force that conducted drug and gang investigations. Based on his past experience as a patrol deputy working a gang detail in Azusa and his current assignment, he was familiar with a juvenile tagging crew known as BSO, or Bud Smokers Only, based in the City of

⁵ The parties stipulated that the three shell casings recovered at the scene had been fired from the gun recovered from Jessica’s room.

Glendora.⁶ He was also very familiar with a criminal street gang in Azusa known as FCK, or Faded Children's Krew or Flore's Children's Killers. FCK evolved from a tagging crew into a street gang. Based on his experience, Deputy Landeros explained that FCK engaged in primary criminal activities such as felony vandalism, assault with a deadly weapon, shootings, and attempted murder. He was also aware of a FCK gang member being involved in drug sales.

According to Detective Landeros, there was a rivalry between FCK and Azusa 13, a street gang that controlled the streets of Azusa since the 1950s and 1960s. FCK was the only Hispanic gang to rival Azusa 13 in the City of Azusa. Azusa 13 engaged in the same types of crimes as FCK. Gangs like FCK and Azusa 13 claimed territory, and those two gangs were in conflict over territory within Azusa. As a result of the rivalry, one of FCK's leaders, Benjamin Castro, was murdered and there was an attempted murder of Detective Landeros and his partner.

FCK gang members had tattoos and used graffiti or symbols to signify their gang membership. Detective Landeros had seen different types of FCK "tagging" throughout Azusa and primarily in the area of 6th Street and Rockvale, an area claimed by FCK. FCK had approximately 30 members or associates.

Defendant was a documented member of FCK whose nickname or moniker was Smash. He associated with FCK "shotcaller" named Robelio Veliz, or Dust, who did not associate with "low-tier" FCK members.

Detective Landeros was very familiar with Perez and Marquez. Perez was a "high-tiered" leader in FCK and Marquez was associated with another gang.

Based on the facts of this case, Detective Landeros opined that the shooting of Preciado was "a gang crime." According to Detective Landeros, the location of the shooting—6th Street and Rockvale—was within territory FCK claimed and the shooting at that location was a direct challenge to Azusa 13, which also claimed that territory. That Preciado, the shooting victim, belonged to the rival BSO crew that also tagged that

⁶ During his tape recorded interview with Detective Hernandez, Miramontes suggested that he and Preciado were members of BSO.

territory, further demonstrated that the shooting was gang motivated. Moreover, although Preciado had dated defendant's girlfriend Jessica, such a potential personal motivation for the shooting would not alter the conclusion that it was gang-related because gang conflicts arise from "different root causes." Preciado's prior relationship with Jessica was an overt sign of disrespect toward defendant which, if defendant did nothing about it, would cause defendant to lose credibility within FCK and potentially to suffer retaliation by other members of the gang.

Detective Landeros confirmed that FCK gang member Miguel Gonzales, or Demon, was convicted of attempted murder in 2009. He also confirmed that FCK gang member Benjamin Castro had a juvenile petition for assault on a police officer sustained in 2009.⁷

PROCEDURAL POSTURE

In an information, the Los Angeles County District Attorney charged defendant⁸ with murder in violation of section 187, subdivision (a). The District Attorney alleged that, in the commission of the murder, defendant: personally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivision (d); personally discharged a firearm within the meaning of section 12022.53, subdivision (c); and personally used a firearm within the meaning of section 12022.53, subdivision (b). The District attorney further alleged that the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members.

⁷ Defendant asserts that the exhibit purportedly showing that Castro's juvenile petition was sustained actually shows that it was dismissed because Castro was deceased.

⁸ Perez and Marquez were also charged with murder in the information.

Defendant pleaded not guilty and denied the special allegations. Following trial, the jury found defendant guilty of first degree murder and found true each of the special allegations.

The trial court sentenced defendant to an aggregate term of 60 years to life comprised of a 25 years to life sentence for the murder charge, an additional, consecutive 25 years to life sentence based on the discharge of a firearm causing great bodily injury and death enhancement under section 12022.53, subdivision (d), and a consecutive 10-year sentence enhancement based on the gang allegation. The trial court also imposed but stayed sentence enhancements based on the firearm allegations under section 12022.53, subdivisions (b) and (c).

DISCUSSION

A. Sufficiency of Evidence In Support of True Finding on Gang Allegation

Defendant contends that there was insufficient evidence to support (i) the jury's finding that the shooting of Preciado was gang-related and (ii) the jury's finding as to the "primary activities" element of section 186.22. According to defendant, the gang expert's opinion was not based on facts showing the shooting was gang-related and the expert failed to testify as to FCK's primary criminal activities.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be

reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ ([*People v. Guerra* [(2006)] 37 Cal.4th [1067,] 1129.])” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

Section 186.22, subdivision (b)(1) requires a two-prong showing to prove a gang allegation: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:” Defendant contends that the prosecution failed to satisfy either prong of the required statutory showing.

Here, there was sufficient evidence to satisfy the first prong of section 186.22, subdivision (b)(1), i.e., defendant committed the shooting in association with a criminal street gang. Defendant was a documented FCK gang member who was known to associate with a “high-tier” FCK gang member, Veliz. Preciado had dated defendant’s girlfriend and the mother of his son in the recent past, conduct which the gang expert characterized as disrespectful toward defendant. Accompanied by Marquez, defendant arranged a “fight,” presumably a fist fight, with Preciado—a BSO tagging crew member—agreeing to both a time and location. In doing so, he cautioned Miramontes not to discuss the plans for the fight with the police, regardless of the outcome of the fight. But, as the agreed-upon time for the fight drew near, he changed the time and location of the fight twice. The ultimate location agreed upon was in a territory claimed by both FCK and Azusa 13. Despite challenging Preciado to a fist fight, defendant arrived at the fight armed with a handgun and accompanied by one “high-tier” FCK member, Perez, and a member of another gang who was also armed, Marquez. Perez and Marquez waited outside the backyard where the fight was to take place to ensure that

Miramontes and the males with him did not interfere with the planned shooting. In the backyard, defendant shot Preciado at close range three times.⁹

The foregoing evidence supported a reasonable inference that defendant, in association with fellow FCK gang member Perez, planned the murder of Preciado to avenge Preciado's act of disrespect toward defendant and his gang. The location of the shooting, in disputed gang territory, supported that inference, as did the cold blooded and vicious nature of the shooting. There was evidence which suggested that, by brutally murdering a disrespectful member of a rival tagging crew in disputed gang territory, defendant and Perez enhanced the reputation of FCK in that territory and the larger community, and at the same time instilled fear in members of the community, all of which showed that the shooting benefited FCK.

There was also evidence sufficient to support a reasonable inference that defendant acted with the requisite specific intent to promote, further, or assist gang members in the commission of the crime. The evidence showed that he committed the shooting in concert with another FCK gang member, Perez, and Marquez, a known member of an unspecified gang. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [5 Cal.Rptr.3d 615].)" (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) As noted above, the evidence also showed that defendant knowingly entered disputed gang territory and committed a preplanned and vicious murder. That evidence suggested that defendant acted, at least in part, to enhance or promote the reputation of his gang for ruthlessness and violence in the community.

Defendant's final challenge to the sufficiency of the gang evidence is based on the assertion that the gang expert failed to specify the primary criminal activities of FCK as

⁹ The autopsy evidence supported a reasonable inference that defendant shot Preciado at close range twice in the back as he tried to flee and a third time in the chest as he lay helpless on the ground.

provided under section 186.22, subdivision (f), which requires the prosecution to prove that one of the “primary activities” of a gang “is the commission of one or more of the criminal acts enumerated in paragraphs (1) through (25) of subdivision (e).” There is no merit to this contention.

During direct examination of the gang expert, the following exchange took place: “Q. You said [FCK] evolved from a tag crew into a criminal street gang; is that correct: A. That’s correct, sir. Q. And the difference would be what? A. Well, a juvenile tagging crew, primarily they—they tag their monikers, their crew name and other types of what they would call artwork onto public and private property. And most of them are juveniles, teenage years, middle school—and high school-aged. That would be a juvenile tagging crew. Q. And a criminal street gang, in your experience and opinion? A. Well, my opinion and experience, a criminal street gang includes those types of vandalism where they tag monikers, gang names on private and public property, but they engage in other patterns of criminal activity. Q. Including primary activities with this particular crew or group? What types of activities have you learned they engage in? A. Felony vandalism, assault with a deadly weapon, shootings-- Q. Shootings could involve—excuse me for interrupting—a negligent discharge of a weapon, attempted murders, murders. Could involve that range of things. What specifically, in your experience, have they involved themselves in? A. Attempted murder.”

That testimony supported a reasonable inference that the primary criminal activities in which FCK engaged included acts of felony vandalism, assaults with deadly weapons, shootings, and attempted murders, each of which is a crime enumerated in section 186.22, subdivision (e).

B. Jury Instruction on Pattern of Criminal Activity

Defendant contends that the trial court erred by instructing the jury that the crimes introduced by the prosecution to show the requisite pattern of criminal activity did not need to be gang-related crimes. According to defendant, when, as here, the prosecution

relies on the charged crime as one of the enumerated crimes that may be used to show a pattern of criminal activity, the charged crime must be gang-related.

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence” (*People v. Blair* (2005) 36 Cal.4th 686, 744.) If a jury instruction is a correct statement of the law, and the defendant fails to request a clarifying instruction, the defendant forfeits any challenge to the instruction on appeal. “The longstanding general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given. [Citations.]” (*People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Defendant does not contend that the instruction on the requisite pattern of criminal activity was an incorrect statement of the law. He contends that given the facts of this case, the instruction should have been clarified by additional language explaining that to the extent the prosecution was relying on the charged crime as one of the enumerated crimes necessary to show a pattern of criminal activity, the prosecution was required to show that the charged crime was gang-related. Because defendant did not request such a clarification at trial, he has forfeited his challenge to the instruction on appeal.¹⁰

C. Due Process Challenge to Gang Expert Testimony

Defendant maintains that because the prosecution did not elicit information showing the shooting was gang-related prior to the testimony of the gang expert, it was an abuse of discretion to allow the gang expert to testify. From defendant’s perspective, the gang expert’s opinions were completely lacking in foundation, such that the admission of those unsupported opinions denied him due process of law.

¹⁰ The Attorney General contends that *People v. Gardeley* (1996) 14 Cal.4th 605, 625, footnote 12, should be read to mean that the predicate offense need not be gang-related for purposes of establishing a pattern of criminal activity, but still had to be gang-related to prove that the crime was for the benefit of or in association with a gang.

1. Background

Prior to the gang expert's testimony, defense counsel objected to him being allowed to testify on the grounds that the prosecution's witnesses had not provided any testimony showing that the shooting was gang-related. The trial court considered the objection, but overruled it, reasoning that defense counsel's argument was directed at the weight to be given to the expert's opinions, not their admissibility. The following colloquy took place: "The Court: Apparently, your objection is not based on expertise, but based upon the facts introduced at the time for him to render an opinion. [¶] [Defense Counsel]: Yes. [¶] The Court: That's a separate question. I don't know what this expert's going to have to say. I don't know what specific facts he's going to rely upon and what he's going to rely upon for rendering his opinion. I don't believe the court's in a position to, as a matter of law, preclude him from offering an opinion on the evidence that has been introduced. The jury has a right—[¶] The question becomes, what weight is given that opinion? And we have an instruction in terms of the assumed facts that either exist or don't exist or proved or not proved in determining whether that opinion is reasonable. We do have an instruction to cover that point. [¶] But for this court to prevent him from testifying as a matter of law, based upon the testimony that I have heard, I don't believe that there's an absence of evidence. There's some evidence, however tangential. And, quite frankly, I'm rather curious to listen to what he has to say, listening to opinions and conclusions based upon what I've heard. But I don't believe whether some evidence—that I can preclude him from offering his expertise. [¶] It's questioning about, what basis can he render an opinion? We have a protective instruction in that regard, and there are future instructions, if any need to be done. [¶] Anything further by the people on that subject? [¶] [Prosecutor]: No. Submitted. . . . [¶] The Court: Objection is noted and overruled."

2. Analysis

"Expert opinion testimony is admissible only if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the

trier of fact.”” (*People v. Watson* (2008) 43 Cal.4th 652, 692 [76 Cal.Rptr.3d 208, 182 P.3d 543], quoting Evid. Code, § 801, subd. (a).) ‘When expert opinion is offered, much must be left to the trial court’s discretion.’ (*People v. Carpenter* (1997) 15 Cal.4th 312, 403 [63 Cal.Rptr.2d 1, 935 P.2d 708].) The trial court has broad discretion in deciding whether to admit or exclude expert testimony (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196 [103 Cal.Rptr.2d 908]), and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. (*People v. Alcala* (1992) 4 Cal.4th 742, 788-789 [15 Cal.Rptr.2d 432, 842 P.2d 1192] (*Alcala*); see *People v. Lindberg* (2008) 45 Cal.4th 1, 45 [82 Cal.Rptr.3d 323, 190 P.3d 664].)” (*People v. McDowell* (2012) 54 Cal.4th 395, 425-426.)

The trial court correctly concluded that defendant’s objection to the expert’s testimony went to the weight to be accorded that testimony, not its admissibility. Contrary to defendant’s assertion, and as discussed above, there was evidence that the shooting was gang-related. Jessica testified that Marquez told her shortly after the shooting that he, defendant, and Perez were being chased by members of Azusa 13, and Miramontes admitted that he and his “homie” Preciado were “from” the BSO tagging crew. Moreover, the expert himself provided key factual information showing that the shooting was gang-related. For example, the expert confirmed that FCK was an established gang in Azusa that engaged in primary criminal activities, as was Azusa 13. He also testified that Azusa 13 and FCK were rivals and that the location of the shooting was in a territory claimed by both gangs. And he confirmed that defendant and Perez were known, documented FCK gang members and that Preciado’s relationship with Jessica would have been considered by FCK gang members as a serious sign of disrespect toward defendant that called for some act of retaliation. Based on the evidence, including the testimony of the gang expert, it was not an abuse of discretion to allow the gang expert to testify, particularly when the jury was subsequently instructed as to the weight to be accorded the expert’s opinion.

D. Sixth Amendment Challenge to Gang Expert Testimony

Defendant argues that the admission of the gang expert's testimony violated the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36. But as defendant concedes, it is well established in California that the Sixth Amendment's Confrontation Clause does not prohibit experts from testifying about testimonial hearsay that forms the basis of their opinions. (See, e.g., *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427.) Therefore, the trial court did not violate defendant's rights under the Sixth Amendment by admitting the gang expert's testimony.

E. Restriction on Defense Counsel's Argument

Defendant contends that the trial court abused its discretion by preventing his counsel from arguing that he shot Preciado out of fear. According to defendant, the evidence supported an argument that he acted out of fear which motive, if accepted by the jury, would have resulted in a different outcome, i.e., a guilty verdict on second degree murder rather than first degree murder.

1. Background

Prior to defense counsel's closing argument, the prosecution objected to an argument slide showing a jury panel and a thought or comment bubble above one of the jurors that read, "Was there fear?" The following exchange then occurred between the trial court and defense counsel: "The Court: There was an objection to two slides. [¶] Would you state them for the record so that there is a record of what those slides said? [¶] [Defense Counsel]: One slide has a jury panel. In one of the commenting bubbles above a juror it specifically indicated, 'was there fear?' And there was an objection to that, and based on the court's ruling, that was now deleted. [¶] The Court: The court inquired of counsel what he meant to argue fear, and your response was when he rode up

to the carport, he saw five people and you can infer fear from that. [¶] [Defense Counsel]: Yes. [¶] The Court: The question is, what is the relevance of that in terms of your argument? [¶] [Defense Counsel]: And my response was that fear—the specific intent to kill that it, in fact, disabled that, because there was no planning or malice aforethought for the killing until—I think it would be reasonably inferred that my client may have felt fear in that-- [¶] The Court: What you’re basically saying is that he saw five people, left them, went searching for one and somehow he transferred that fear to the . . . victim? [¶] [Defense Counsel]: Yes. Based on the totality of the circumstances, if he’s going into a backyard by himself, that the victim’s larger than he is and there’s five friends of the victim. [¶] The Court: Who are not present anymore. [¶] [Defense Counsel]: That’s correct. [¶] The Court: And that goes to what? [¶] [Defense Counsel]: It goes to the specific intent, forming specific intent before the fight, that-- [¶] The Court: The court would, under 352, find that misleads the jury in terms of where fear comes into play in regards to people outside at a different location, separate from all the other people and no one else is present. [¶] It raises the issue of imperfect self-defense. We don’t know what the state of mind of the defendant was. You can draw reasonable inferences, but I think that’s a stretch in regards to taking that fear from that group to the victim.”

2. *Analysis*

In support of his argument that the evidence supported a reasonable inference that he shot Preciado out of fear, defendant cites four facts from the record: (i) Preciado was larger than defendant; Preciado had more cohorts at the location of the fight than defendant, who was accompanied only by Marquez and Perez; defendant told Jessica the night of the shooting that when he saw the number of cohorts on Preciado’s side, he became scared and shot Preciado; and prior to the fight, Miramontes told defendant “that fool [Preciado] ain’t no bitch, dog. That fool [Preciado will] fuck you up fool. You know.”

During his argument in support of the disputed slide in the trial court, however, defendant's counsel relied upon only two facts: Preciado was larger than defendant and Preciado had more people on his side the night of the fight. Based solely on those two facts, the trial court ruled that it would be speculative for defense counsel to argue that defendant acted out of fear. But the trial court made no ruling with respect to the other two facts—defendant's statement to Jessica that he shot Preciado because he was scared and Miramontes's statement that Preciado would “fuck [defendant] up” during the arranged fight.

As to the argument that was made to the trial court based on Preciado's size and the number of cohorts on his side, we conclude that the trial court did not abuse its discretion. As defendant concedes in his reply brief, section 1044 “authorizes the [trial] court to limit [defense] counsel's argument to relevant and material matters” ““Only relevant evidence is admissible (Evid. Code, § 350; [citations]), and, except as otherwise provided by statute, all relevant evidence is admissible (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d) . . .).” [Citation.] “Relevant evidence is defined in Evidence Code section 210 as evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ The test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” [Citation.] [¶] . . . ‘[T]he trial court has broad discretion to determine the relevance of evidence.’ (*People v. Cash* [(2002)] 28 Cal.4th [703,] 727.)” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

As for the fact that Preciado was larger than defendant, it was not unreasonable for the trial court to conclude that arguing fear based on that fact was speculative. The evidence showed that defendant challenged Preciado to the fight, arrived at the fight armed, and went straight to the backyard to confront Preciado, none of which suggests that Preciado's size invoked fear in defendant. As for the disparity in the number of cohorts, the trial court reasonably concluded that it would be speculative to infer that the number of people outside the backyard had any effect on defendant's state of mind when

he entered the backyard to confront Preciado who was alone. There was no evidence that Preciado or any of his cohorts were armed, whereas there was substantial evidence that defendant and Marquez were armed. Thus, the number of Preciado's cohorts, by itself, did not support a reasonable inference that defendant entered the backyard and shot Preciado because he was afraid of Preciado's cohorts outside that location.

As for the two statements that defendant raises and relies upon for the first time on appeal, even assuming the trial court erred because those statements would have supported an argument that defendant acted out of fear, any such error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) First, defendant's statement to Jessica and Miramontes's statement to defendant were both in evidence and the jury was properly instructed concerning premeditation. Therefore, assuming those statements supported a reasonable inference that defendant acted out of fear, the jury was free to draw that conclusion, but it instead concluded that defendant acted with premeditation notwithstanding those statements.

Moreover, defendant's statement to Jessica that he acted out of fear and Miramontes's statement to defendant that Preciado would "fuck [defendant] up" were, at best, weak evidence in support of defendant's argument that he acted out of fear and therefore could not have premeditated the murder of Preciado. By contrast, the evidence of premeditation was strong and compelling. Defendant challenged Preciado to a fight and intentionally changed the time of the fight so that it would occur at night. Defendant and at least one of his cohorts then arrived at the prearranged location for the fight armed, while Preciado and his cohorts were unarmed, presumably because they believed a fist fight had been arranged between defendant and Preciado. Under the cover of darkness, defendant went to the backyard of the prearranged location alone with Preciado. Once there, he pulled out the handgun he had brought with him and shot Preciado twice in the back and then once in the chest while Preciado was lying helplessly on the ground mortally wounded.

The evidence of defendant's conduct on the day of the murder strongly supported the jury's finding that defendant premeditated and then carried out the cold blooded

murder of Preciado. Therefore, even if the trial court had allowed his counsel to argue that defendant acted out of fear based on the statements of Jessica and Miramontes, it is not reasonably likely that a jury would have made a different finding on the issue of premeditation. As noted, the two statements did not constitute evidence of fear that would have been sufficient to overcome the plain inference from the other evidence that defendant premeditated the murder.

F. 10-Year Sentence Enhancement Under Section 186.22, Subdivision (b)(1)(C)

Defendant contends, and the Attorney General agrees, that the trial court erroneously imposed a 10-year sentence enhancement under section 186.22, subdivision (b)(4). According to defendant, section 186.22, subdivision (b)(5) was applicable to the charged crime in this case, and it exempts felonies punishable by life imprisonment, such as murder, from imposition of the 10-year sentence enhancement under section 186.22.

We agree with the parties that the trial court erred in imposing the 10-year sentence enhancement under section 186.22. We therefore remand the matter to the trial court with instructions to modify the abstract of judgment by deleting the 10-year sentence enhancement under section 186.22.

DISPOSITION

The matter is remanded to the trial court with instructions to modify the abstract of judgment to delete the 10-year sentence enhancement under section 186.22. In all other respects, the judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.